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# In The Supreme Court of the United States

**JEFFREY BROWN,**
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## Petition for Writ of Certiorari

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## QUESTIONS PRESENTED FOR REVIEW

WHETHER THE WRIT OF CERTIORARI SHOULD BE GRANTED:

A. TO RESOLVE THE QUESTION LEFT OPEN IN *CUSTIS v. UNITED STATES*, 511 U.S. 485 (1994), TO-WIT: DOES RELIEF LIE UNDER 28 U.S.C. § 2255 TO REOPEN A FEDERAL SENTENCE WHICH WAS ENHANCED WITH A PRIOR CONVICTION WHICH WAS SUBSEQUENTLY INVALIDATED; AND

B. TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW OF THE ELEVENTH CIRCUIT AND THIS COURT'S DECISION IN *CUSTIS* AND THE DECISION OF THE NINTH CIRCUIT IN *UNITED STATES v. McCHRISTIAN*, 47 F.3d 1499 (9th Cir. 1995) AS TO WHETHER THE LIMITATIONS IMPOSED BY 21 U.S.C. § 851 UPON CHALLENGES TO PRIOR CONVICTIONS ONLY APPLY TO CHALLENGES MOUNTED AT THE FEDERAL SENTENCING HEARING?

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## OPINIONS BELOW

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## STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Eleventh Circuit which was entered on January 28, 1999 and is referenced in the Federal Reporter as *Brown v. United States*, 170 F.3d 188 (11th Cir.1999) as a decision without reported opinion. The unpublished opinion, entered that same date, appears in the appendix as App. 1. A timely filed application for extension of time within which to file a petition for writ of certiorari was granted to June 21, 1999. A timely filed application for further extension of time within which to file a petition for writ of certiorari was granted to June 28, 1999. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 21 of the United States Code, § 851(c)(2), provides as follows:

> A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by

the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Title 28 of the United States Code, § 2255, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.... If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

## STATEMENT OF THE CASE

In 1974, state drug charges were brought against the petitioner in Pennsylvania. The petitioner received treatment and rehabilitation and successfully completed probation without verdict in 1976. Under Pennsylvania law, where "a person has successfully completed his term of probation without verdict, the underlying charges must be dismissed."[1] Thereafter, the state records must be automatically expunged and destroyed.[2] The Pennsylvania law prohibits, upon pain of criminal prosecution, anyone from either learning of such destroyed records or treating any such record as an arrest or prosecution for any purpose, civil or criminal, public or private.[3]

Following a jury trial held in 1989, the petitioner was convicted in the United States District Court for the Southern District of Florida of possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The state

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[1] *Commonwealth v. Benn*, 544 Pa. 144, 149, 675 A.2d 261, 263 (Pa.1996), citing 35 P.S. § 780-117(3).

[2] See 35 P.S. § 780-119(a).

[3] § 780-119(b) provides as follows:

> Any expunged record of arrest or prosecution shall not hereafter be regarded as an arrest or prosecution for the purpose of any statute or regulation or license or questionnaire or any civil or criminal proceeding or any other public or private purpose. No person shall be permitted to learn of an expunged arrest or prosecution, or of the expunction, either directly or indirectly. Any person, except the individual arrested or prosecuted, who divulges such information in violation of this subsection shall be guilty of a summary offense and shall, upon conviction thereof, be punished by imprisonment not exceeding thirty (30) days or a fine not exceeding five hundred dollars ($500) or both.

records of the petitioner's Pennsylvania drug conviction of 1974 had not been destroyed in accordance with the aforementioned Pennsylvania law. As a result, the petitioner's federal sentence was enhanced, pursuant to 21 U.S.C. §§ 851 and 841(b)(1)(A), from a minimum 10-year sentence to a term of imprisonment for 20 years. (App. 12-26).

The petitioner returned to the Pennsylvania court and requested that his state records be destroyed. The Pennsylvania court agreed and the records were destroyed. The petitioner filed with the district court a motion pursuant to 28 U.S.C. Section 2255 [2255 motion] seeking to reopen his enhanced federal sentence. (App. 40-43). The 2255 motion cited *Custis v. United States*, 511 U.S. 485 (1994), wherein this Court stated in dicta that a defendant who is successful in attacking state sentences "... may then apply for reopening of any federal sentence enhanced by the state sentences." *Id.* at 497. The petitioner supported his 2255 motion with a memorandum of law (App. 9-11) with attached exhibits including the following: a copy of the Pennsylvania court order which directed, *inter alia*, the destruction of all of the state records pertaining to the petitioner's state drug offense (App. 34-36); and written confirmation from the Federal Bureau of Investigation indicating that pursuant to the Pennsylvania court order, the FBI had effected a "complete expunction" from its files of the Pennsylvania case (App. 38).

The 2255 motion was referred to the United States Magistrate Judge who issued a Report and Recommendation. (App. 3-8). The magistrate recommended denial upon two grounds. First, the magistrate found that because the petitioner had not attacked his Pennsylvania conviction on constitutional grounds, 21 U.S.C. § 851(c) barred resentencing. Second, the magistrate found that relief was also barred pursuant to the reasoning of *United States v. Cox*, 83 F.3d 336 (10th Cir.1996).

The petitioner filed objections which the district court overruled. The district court denied the § 2255 motion based solely upon the Report and Recommendation of the magistrate. (App. 2). The petitioner appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed "for the reasons stated in the Report and Recommendation of the magistrate judge. (App. 1).

## ARGUMENT

### A.

THE WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION LEFT OPEN IN *CUSTIS v. UNITED STATES*, 511 U.S. 485 (1994), TO-WIT: DOES RELIEF LIE UNDER 28 U.S.C. § 2255 TO REOPEN A FEDERAL SENTENCE WHICH WAS ENHANCED WITH A PRIOR CONVICTION WHICH WAS SUBSEQUENTLY INVALIDATED.

The issue whether relief lies under 28 U.S.C. § 2255 to reopen a federal sentence which was enhanced with a prior conviction which was subsequently invalidated was left open by this Court in *Custis v. United States*, 511 U.S. 485 (1994). *Custis* held that under 18 U.S.C. § 924(e), unless a defendant in a federal sentencing proceeding was claiming a violation of his right to counsel, he had no right at that time to mount a collateral attack upon a prior state conviction. To this holding, the Court added the following in dicta:

> We recognize, however, as did the Court of Appeals ... that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under §

> 924(e), may attack his state sentences in Maryland or through federal habeas review. If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

*Custis*, 511 U.S. at 497.

The First, Fourth, Fifth, Ninth and Tenth Circuits have adopted the *Custis* dicta and now allow a defendant who has successfully attacked a state conviction to reopen any federal sentence enhanced by the state conviction. See *United States v. Pettiford*, 101 F.3d 199, 200-202 (1st Cir.1996); *United States v. Bacon*, 94 F.3d 158, 161 n.3 (4th Cir.1996); *United States v. Nichols*, 30 F.3d 35, 36 (5th Cir.1994); *United States v. LaValle*, ___ F.3d ___, 1999 WL 274162 (9th Cir.1999); *United States v. Cox*, 83 F.3d at 339-340. In the present case, however, the Eleventh Circuit barred the petitioner from reopening his federal sentence despite his successful challenge to the state conviction which had been used to enhance his federal sentence. Certiorari review is sought to resolve the conflict and determine the issue left open in *Custis*.

B.

THE WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW OF THE ELEVENTH CIRCUIT AND THIS COURT'S DECISION IN *CUSTIS* AND THE DECISION OF THE NINTH CIRCUIT IN *UNITED STATES v. McCHRISTIAN*, 47 F.3d 1499 (9th Cir. 1995) AS TO WHETHER THE LIMITATIONS IMPOSED BY 21 U.S.C. § 851 UPON CHALLENGES TO PRIOR CONVICTIONS ONLY APPLY TO CHALLENGES MOUNTED AT THE FEDERAL SENTENCING HEARING?

The Eleventh Circuit reached its conclusion based upon an interpretation of 21 U.S.C. § 851 which conflicts both with the plain meaning of the statute and the interpretation given the statute by this Court in *Custis* and the Ninth Circuit in *United States v. McChristian*, 47 F.3d 1499 (9th Cir.1995). 21 U.S.C. § 851 is entitled "Proceedings to establish prior convictions" and establishes the procedures to be followed when a United States attorney seeks to enhance a defendant's sentence with one or more prior convictions. The statute limits attacks upon prior convictions which are mounted by defendants in their federal sentencing proceedings. Contrary to the Eleventh Circuit's view, the statute does not limit a defendant's right to resentencing where, as here, he merely seeks to report to the federal sentencing court that an attack upon a prior conviction used to enhance his federal sentence has been successfully mounted outside the federal sentencing hearing. An examination of the statute demonstrates the error of the Eleventh Circuit's interpretation and the resulting conflict with *Custis* and *McChristian*.

Under § 851(a)(1), where the United States attorney seeks to enhance a federal sentence with a prior conviction, the defendant must be furnished timely notice of the convictions by way of an information before trial or before a guilty plea. Under § 851(b), the district court must afford the defendant the opportunity to affirm or deny that he has been previously convicted as alleged in the information and advise the defendant that any challenge to the prior conviction must be made before sentence is imposed. Under § 851(c)(1), if the defendant denies any allegations in the information or claims the invalidity of any prior conviction, he must file a written response which triggers a hearing. The particular provision at issue here, § 851(c)(2), provides as follows:

> A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

The case at bar presents the question whether § 851(c)(2) only limits a challenge to a prior conviction being made at the federal sentencing proceeding, or whether, as found by the Eleventh Circuit, the provision bars the reopening of any federal sentence based upon a prior conviction not being challenged upon constitutional grounds, even where, as is the case here, the reopening is sought on the ground that the prior conviction has been successfully

challenged outside and after the federal sentencing proceeding.

The interpretation of the statute by the Eleventh Circuit conflicts with this Court's interpretation of § 851(c)(2) which was stated in *Custis* as follows: "The language of § 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so." *Custis*, 511 U.S. at 492 (emphasis supplied). See also *Nichols v. United States*, 511 U.S. 738, 765 (1994) (Ginsburg, J., dissenting) ("Custis presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction...".) In direct conflict with the above-quoted language from *Custis*, the court of appeals approved the reasoning of the magistrate judge that "[s]ince the movant does not contend that his [Pennsylvania] conviction was invalidated by the State Court on constitutional grounds, he cannot prevail in an attack on that conviction pursuant to 21 U.S.C. § 851(c)." This interpretation of § 851(c) erroneously broadens its application beyond federal sentencing proceedings.

The decision below also conflicts with *McChristian*. In that case, the Ninth Circuit was called upon to interpret the limitations period contained in § 851(e) which provides: "No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction." The Ninth Circuit concluded that the phrase "challenge the validity" does not refer to a defendant's mere reporting to the federal sentencing court that a prior conviction has been invalidated in a state court proceeding. Part of the court's reasoning was based upon its review of each reference in § 851 to the word "challenge", with particular reliance upon the unambiguous use of the word in § 851(c)(2) which, as previously noted, outlines the steps a defendant must take to mount a challenge in the federal sentencing court. The court concluded therefrom that

"challenge" to a prior conviction is used throughout § 851 as meaning "a full-blown, collateral attack in federal court on the prior conviction...". *Id.* (emphasis supplied). Thus, there is conflict with the Ninth Circuit as well.

The reopening of the petitioner's federal sentence is supported by logic and fairness. Had the Pennsylvania records of the petitioner's prior conviction been properly destroyed prior to his federal sentencing, the federal sentence could not have been enhanced for the simple reason that there would have been no record of the Pennsylvania case. Indeed, the Pennsylvania statute provides for the imposition of criminal sanctions for any use of records destroyed under the act. Simply because the error of the Pennsylvania courts in failing to destroy the petitioner's state records was not corrected until after the petitioner's federal sentence had been imposed does not constitute a logical or equitable reason to allow the petitioner's enhanced sentence to stand.

The petitioner's claim was also rejected below based upon the decision of the Tenth Circuit in *Cox*. The issues surrounding *Cox* present additional grounds for review. In *Cox*, the defendant filed a § 2255 motion seeking resentencing on the ground that several of his prior state court convictions, which had entered into the calculation of his criminal history category under the Sentencing Guidelines, had been dismissed or expunged under state law. The district court denied the motion and the Tenth Circuit reversed, holding that under *Custis*, the defendant's sentence should be reopened and recalculated under the Guidelines. The Tenth Circuit directed the district court to ascertain whether under the state statutes the state court convictions had been "expunged" rather than "set aside" within the meaning of the Sentencing Guidelines. The distinction between the two concepts, which was suggested by the Tenth Circuit in *Cox*, became the law in that circuit in *United States v. Hines*, 133 F.3d 1360 (10th Cir.1998). *Hines* held that under § 4A1.2(j) of the Guidelines, which provides that sentences for expunged convictions are not counted in

calculating a defendant's criminal history category, convictions excluded from the criminal history calculation are those in which the defendant was found innocent or where there was an error of law as opposed to those convictions merely set aside or pardoned in order to restore civil rights or remove the stigma associated with a conviction. The Tenth Circuit reached this conclusion (even though the Guidelines do not define the term "expunged") by relying upon Application Note 10 to § 4A1.2(j).

Even assuming, *arguendo*, the correctness of the Tenth Circuit analysis, it is inapplicable to the petitioner's case because the Sentencing Guidelines are not at issue here. The petitioner's sentence was not calculated under the Guidelines at all.

Additionally, the petitioner's prior Pennsylvania case cannot be deemed an "expunged" conviction as that word is defined by the Guidelines or state statutes which, unlike the Pennsylvania statute here, fail to render the state court records non-existent and unavailable to the federal government for any use. In that respect, this Court's decision in *Dickerson v. New Banner Institute*, 460 U.S. 103 (1983) is also distinguishable. In *Dickerson*, the defendant pled guilty to a violation of Iowa law and was placed on probation. This Court held that although the judgment was "expunged" under Iowa law, the guilty plea constituted a "conviction" under federal law sufficient to deny the defendant a license to deal firearms. This Court noted that expunction under Iowa law meant "... no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law." *Id.* Accordingly, this Court concluded that the defendant's conviction expunged under Iowa law constituted a conviction within the meaning of the Gun Control Act of 1968. Also, the Iowa statute in *Dickerson* did not "alter the historical fact" of the state court conviction. 460 U.S. at 114-15.

Here, however, the Pennsylvania statute does that which the Iowa statute in *Dickerson* did not. The petitioner's

Pennsylvania case does not now exist and should not have existed at the time of his federal sentencing. Consequently, unlike the Iowa statute at issue in *Dickerson*, the Pennsylvania statute provides much more than the mere "means for the trial court not to accord a conviction certain continuing effects" and does indeed "alter the historical fact" of the Pennsylvania conviction.

A decision under the Sentencing Guidelines which is analogous to the petitioner's case is *United States v. Beaulieau*, 959 F.2d 375 (2d Cir.1992). In *Beaulieau*, the district court calculated the defendant's criminal history category under the Sentencing Guidelines by including the defendant's Vermont juvenile burglary conviction which had been sealed pursuant to that state's juvenile statute. Under the Vermont statute, after a file is sealed, "the proceedings in the matter under this act shall be considered never to have occurred, all index references thereto shall be deleted, and the person, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry in any matter." *Id.*, at 380 (quoting 33 V.S.A. § 665(c)). However, contrary to the statute, all references to the defendant's conviction had not been deleted and as a result, the probation officer who prepared the federal presentence report used the prior conviction to determine the criminal history category which the district court approved. On appeal, the Second Circuit ruled that the state conviction had been improperly considered, reasoning in pertinent part as follows:

> In the instant case, Townsend took all of the required steps to remove his prior burglary conviction from his record by moving to have that record sealed. The language of the [Vermont] statute indicates that the process of sealing was intended wholly to eliminate any trace of the past proceeding. Indeed, but for the clerical error

> which resulted in the failure to remove all cross references to the prior conviction, neither the probation officer nor the district court would have learned of the prior conviction. In view of what we believe to be the intent of the legislature wholly to erase Townsend's prior conviction from Vermont's criminal records, we hold that the 1980 conviction should have been deemed "expunged". We vacate his sentence and remand his case to the district court for the limited purpose of resentencing him in accordance with this opinion.

*Beaulieau*, 959 F.2d at 381.

The same reasoning applies here. The purpose of the Pennsylvania statute is to erase the state case from existence and prohibit any use of it whatsoever. But for the error of the state court in failing to have automatically erased the petitioner's Pennsylvania conviction prior to his federal sentencing, that conviction would never have been discovered and invoked for enhancement.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4004
Non-Argument Calendar

D.C. Docket No. 96-1045-CV-JWK and 89-153-CR-JWK

JEFFREY BROWN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(January 28, 1999)
Entered: January 28, 1999

Before TJOFLAT, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

Like the district court, we find no merit in petitioner's claim for the reasons stated in the Report and Recommendation of the magistrate judge.

AFFIRMED.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case Nos. 96-1045-CIV-Kehoe**
**89-0153-CR-Kehoe**

**JEFFREY BROWN**
**Petitioner,**

**vs.**

**UNITED STATES OF AMERICA,**
**Respondent.**

**ORDER**

Entered: November 18, 1997

***FOR THE REASONS*** stated in the Report and Recommendation of the United States Magistrate Judge, and upon an independent review of the file, it is

***ORDERED AND ADJUDGED*** that the motion to vacate, set aside or correct sentence is ***DENIED***. It is

***FURTHER ORDERED AND ADJUDGED*** that all pending motions that have heretofore not been ruled upon are ***DENIED*** as ***moot***.

***DONE AND ORDERED*** in Chambers at Miami, Dade County, Florida, this 18th day of November, 1997.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Paul Morris, Esq.
Emalyn Weber, Esq. (AUSA)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

JEFFREY BROWN,
Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

CASE NO. 96-1045-CIV-KEHOE
89-153-CR-KEHOE

REPORT AND RECOMMENDATION

Entered: May 29, 1997

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. § 2255, which was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

On March 31, 1989, the movant and two co-defendants, Suleman Bengharsa and Saddegh Gharssa, were charged by indictment with conspiracy to possess heroin with intent to distribute, in violation of 21 U.S.C. § 846 (Count I) and possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841 (a) (1) (Count II). The movant also was charged with carrying a firearm during the commission of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count III). On July 7, 1989, a jury returned a verdict of guilty as to Count II and not guilty as to Counts I and III.

On September 11, 1989, the movant was sentenced to twenty years imprisonment followed by five years of supervised release. The applicable minimum penalty of ten

years was enhanced, pursuant to 21 U.S.C. §§ 851 and 841 (b) (1) (A), based on a felony drug conviction in Harrisburg, Pennsylvania. The movant appealed his conviction and sentence in the instant case, and on July 3, 1990, the Eleventh Circuit Court of Appeals affirmed the judgment of the district court.

In the instant motion, the movant contends that his Pennsylvania case should have been dismissed, and his record expunged, prior to the federal sentencing. In the prior state case, the movant was convicted of a drug offense and placed in a probationary diversion program. Pursuant to PENN. STAT. 35 P.S. §780-118 (e) (effective June 14, 1972), in certain specified instances "a criminal charge may be held in abeyance pursuant to this section for no longer than the lesser of either (i) the appropriate statute of limitations or (ii) the maximum term that could be imposed for the offense charged. At the expiration of such period, the criminal charge shall be automatically dismissed." By order dated April 19, 1976, the movant was released from probation, but no order of dismissal was issued.

On April 8, 1991, after the federal sentence was imposed, the movant petitioned the Commonwealth of Pennsylvania for the dismissal of his criminal case on the ground that the charges against him should have been automatically dismissed. On April 18, 1991, an order was entered by the Court of Common Pleas expunging and destroying the official and unofficial arrest and other records of the movant pertaining to his 1974 criminal drug case. (Exhibit 4 of Defendant's Memorandum of Law in Support of Motion Under 28 U.S.C. § 2255.) Based on the dismissal and expungement, the movant contends that his federal sentence should be reopened, since the enhancement no longer is proper.

The Government argues the movant is not entitled to relief because 21 U.S.C. § 851 (e) provides that no person may challenge the validity of a prior conviction which became final more than five years before the date of the

information. The Government relies on United States v. Williams, 954 F.2d 668 (11th Cir. 1992), which held this provision to be constitutional. However, in Williams the defendant sought to challenge his prior conviction in the federal sentencing proceeding. In the instant case, the movant has successfully challenged his prior conviction in the appropriate state forum, and 21 U.S.C. § 851 (e) does not apply. See, United States v. McChristian, 47 F.3d 1499, 1503 (9th Cir. 1995).

The procedure followed by the movant was endorsed in Custis v. United States, 114 S.Ct. 1732, 1733 (1994). There the court held that a defendant may attack state sentences in the appropriate state court, and thereafter apply for reopening of any federal sentence which has been enhanced by those state sentences. The issue before the Court, then, is whether the movant's sentence properly has been enhanced by a conviction for which the records have been expunged by the Pennsylvania Court.

Virtually all of the cases dealing with the use of expunged convictions for enhancement purposes have addressed the propriety of enhancements under the Sentencing Guidelines. For example, in United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996), the defendant had successfully attacked four prior convictions in state court, resulting in their dismissal and/or expungement. Those convictions had been used to enhance the defendant's federal sentence, and he sought Section 2255 relief. The district court denied the defendant's request to modify his sentence following expungement of his prior criminal records and the defendant appealed. Id. at 338-339.

The court in Cox determined that the Federal Sentencing Guidelines must be analyzed in conjunction with the applicable state law. The Court first noted that pursuant to U.S.S.G. § 4A1.2(j), an expunged conviction may not be included in a defendant's criminal history calculation. Commentary Application Note 6 to § 4A1.1(j) states that convictions reversed or vacated for reasons related to

constitutional invalidity, innocence, or errors of law are expunged for guideline purposes, and therefore cannot be included in criminal history calculations. Id. However, according to U.S.S.G. § 4A1.2, Commentary, Application Note 10, when convictions are set aside for reasons other than innocence or errors of law, such as to restore civil rights or remove the stigma of a criminal conviction, those convictions are counted for criminal history purposes. Id. at 340. Based on these provisions, the Tenth Circuit remanded the case for a determination of the basis for the expungement or dismissal of the prior offenses. Id. at 339-340.

In the instant case, the applicable Pennsylvania statute provides for automatic dismissal upon successful completion of a probationary period, but states nothing about expungement. PA ST 35 P.S. § 780-118 (e). However, as authorized by Commonwealth of Pennsylvania v. Cook, 518 A.2d 858 (1986), the Pennsylvania court ordered an expungement of the movant's records based on an application made by the movant two years after his federal sentence was imposed. In Commonwealth of Pennsylvania v. Restauri, 664 A.2d 593, 596 (1995), the court noted that expungement normally is granted where a defendant is found not guilty, where charges were dismissed at a preliminary hearing stage, or where an ARD [drug diversion] program has been completed.

It is apparent that the movant's conviction was dismissed, and subsequently his record was expunged, based on his successful completion of a drug diversion program, and not as the result of constitutional invalidity, innocence or error of law. Therefore, pursuant to U.S.S.G. § 4A1.2, Commentary, Application Note 10, the conviction properly could be counted for Guidelines purposes.

It is important to note, however, that the movant's sentence was enhanced pursuant to 21 U.S.C. §§ 841 (b) (1) (A) and 851. While Section 851 (c) establishes a procedure for attacking the constitutional validity of a conviction which the Government seeks to use to enhance sentence, there is no

similar vehicle challenging convictions where the charges have been dismissed and the record expunged years after the date of conviction. Clearly, Congress could have enacted a provision similar to U.S.S.G. § 4A1.2(J), but elected not to do so.

Since the movant does not contend that his conviction was invalidated by the State Court on constitutional grounds, he cannot prevail in an attack on that conviction pursuant to 21 U.S.C. § 851 (c). Moreover, even if the Court were to infer that an expunged conviction is subject to challenge, the movant would not prevail based on the reasoning of Cox, supra. Therefore, the movant's sentence was properly enhanced under 21 U.S.C. § 841 (b) (1) (A), and no reduction in that sentence is warranted.

## CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the motion to Vacate, Set Aside, or Correct Sentence be DENIED.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable James W. Kehoe, Senior United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 29th day of May, 1997.

/s/LURANA S. SNOW
LURANA S. SNOW
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies to:

Paul Morris, Esq.
AUSA Emalyn Weber (MIA)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DIVISION OF FLORIDA
MIAMI DIVISION

CASE NO. 89-153-CR-KEHOE

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

JEFFREY BROWN,
Defendant/Movant.

# DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION UNDER 28 U.S.C. § 2255 TO CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Jeffrey Brown was charged in a three-count indictment with conspiracy to possess with intent to distribute heroin (count 1), possession with intent to distribute heroin (count 2), and carrying a firearm during the commission of a crime (count 3). A jury found Brown not guilty of counts 1 and 3 and guilty of count 2. Sentencing proceedings took place on September 6 and 11, 1989. Based upon a prior Pennsylvania charge (Commonwealth of Pennsylvania v. Jeffrey Brown, Case No. 1974-335), the district judge enhanced Brown's sentence from a ten-year minimum mandatory to a twenty-year minimum mandatory sentence. (Exhibit 1, sentencing transcript of 9/11/89, at 3-4, 17). Brown was remanded into custody and remains in custody at the FCI, Miami, Florida.

Brown's Pennsylvania charges should have been dismissed and his record expunged prior to the sentencing in the case at bar. Brown had been placed on probation in the Pennsylvania case. Brown successfully completed the term.

An order reflecting the successful completion and releasing Brown was entered on April 19, 1976. (Exhibit 2).

In April, 1991, Brown petitioned the Pennsylvania court for dismissal and expungement of his prior charge on the ground that by statute, the charge should have been automatically dismissed upon the successful completion of the probationary term. (Exhibit 3). On April 18, 1991, the Pennsylvania court granted the relief requested by entering an order directing the expungement of Brown's records in the 1974 case. (Exhibit 4). (By entering the expungement order, the Pennsylvania court recognized the charge as dismissed. Expungement, under Pennsylvania law, is allowed only upon withdrawal, acquittal or dismissal of charges. See 35 P.S. § 780-119(a). Brown was not acquitted and the charge was not withdrawn. Thus, the expungement rested upon dismissal.) The expungement was confirmed by the Pennsylvania State Police (Exhibit 5) and the Federal Bureau of Investigation. (Exhibit 6).

Having successfully obtained the dismissal and expungement of the state charge, Brown is now entitled, pursuant to 28 U.S.C. § 2255, to the reopening of the instant federal sentence which was enhanced by the state charge. In *Custis v. United States*, __ U.S. __, 114 S.Ct. 1732 (1994), the Supreme Court stated in dicta that a defendant who is successful in attacking state sentences "... may then apply for reopening of any federal sentence enhanced by the state sentences." *Id.*, at 1739. In *United States v. Nichols*, 30 F.3d 35 (5th Cir.1994), the Fifth Circuit held, based upon *Custis*, that a federal prisoner is entitled to relief under 28 U.S.C. § 2255 when his state conviction which formed the basis of career offender status was overturned after the federal sentencing.

Under these authorities, Brown is entitled to § 2255 relief to reopen his federal sentence which was enhanced by the now dismissed and expunged state charge. The state case should have been automatically dismissed upon Brown's successful completion of the probationary term. Therefore,

the charge should not have been available for enhancement at the time of the federal sentencing. The Pennsylvania court did not correct the error until after Brown's sentencing, an error which is not attributable to Brown. Fortunately, relief pursuant to 28 U.S.C. § 2255 is available to Brown for correction of the erroneous enhancement. *Custis, supra*; *Nichols, supra*.

WHEREFORE, the defendant respectfully requests that the court grant his motion pursuant to 28 U.S.C. § 2255 and correct his sentence.

I HEREBY CERTIFY that a copy of the foregoing was mailed to the Office of the United States Attorney, 99 NE 4th Street, Miami, FL 33130, this the 17th day of April, 1996.

Respectfully Submitted,

LAW OFFICES OF PAUL MORRIS, P.A.
999 Ponce De Leon Blvd.
Suite 550
Coral Gables, FL 33134-3037
(305) 446-2020

/s/

PAUL MORRIS
Counsel for Jeffrey Brown

**EXHIBIT 1**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-153-Cr-KEHOE

Miami, Florida
September 11, 1989

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JEFFREY BROWN,
Defendant.

TRANSCRIPT SENTENCING BEFORE
THE HONORABLE JAMES W. KEHOE

Filed: November 29, 1989

APPEARANCES:

FOR THE GOVERNMENT:
EMALYN SORG AND MARC JIMENEZ
ASSISTANT U.S. ATTORNEYS

FOR THE DEFENDANT:
ALVIN ENTIN, ESQ.

COURT REPORTER:
PAUL HAFERLING

THE COURT: United States versus Brown. Counsel for the Government dictate an appearance in the record.

MS. SORG: Emalyn Sorg along with Marc Jimenez for the United States.

THE COURT: Counsel for the defendant.

MR. ENTIN: Alvin Entin for Jeffrey Brown.

THE COURT: I believe we got to that point where your client made allocution for considerable period of time. We are at the posture of enhancement.

MS. SORG: The posture of enhance, his allocution, he reserved additional allocution with regard to his character and background.

THE COURT: We will give him that opportunity.

MR. ENTIN: We were discussing the enhancement. I have read Miss Sorg's response. Candidly I disagree with what she is saying. It is clear to me, Judge, the person cannot.

I think it clearly subsection two clearly refers to the prior conviction having to be by indictment because the enhancement only develops itself out a felony conviction. Anyway for it to be applicable it has to be referring to the prior conviction, not to the subsequent or charge, and Miss Sorg's only argument with regard to this semantic argument, she believes it may apply to the present conviction.

If Court can't be sure whether it applies to prior conviction, or to the present case, then the entire statute should be void for vagueness, if there is no clarity with regard to which it applies to.

I think it clearly applies to the prior conviction. I think also it clearly indicates that it had to be by indictment. It clearly indicates that a denial of due process would obviously result as we have indicated in our motion. Rely on the case law cited there in.

THE COURT: I have the information regarding the sentencing enhancement. The defendants opposition to enhancement of the sentence and the Government's response to the defendant's opposition to enhancement of sentence.

The only thing I want to be sure the record is clear is that there was indeed a conviction in case 74-335, Commonwealth of Pennsylvania versus Jeffrey Brown. Is there any dispute as to that?

MR. ENTIN: I am reading it for a second, Judge. It would appear to me - - I am not exactly sure on how to argue this. It would appear from reading the notes that this was something akin to a withholding of adjudication under Florida State Law.

I don't know whether this establishes effectively a conviction for the felony, required treatment and then it refers to it, defendant cooperates fully in the program offered by Lucern County mental health center during your treatment and you shall come by weekly report of the progress be made to the center county probation department. The above deferment is made with the understanding. So apparently there is a deferral. I don't know whether this constitutes effectively a conviction for purposes - - -

THE COURT: Do you contest the authenticity of the document attached to - - the document entitled information regarding to the sentencings enhancement?

MR. ENTIN: No. I don't to the authenticity.

THE COURT: Then it is the decision of this Court that the record clearly shows a prior conviction of drugs; possession with intent to distribute. Any further argument on the enhancement from the defendant?

MR. ENTIN: No.

THE COURT: It would appear to the Court I am obligated and mandated to enhance this sentence. Your client may now make any allocution you or he cares to.

THE DEFENDANT: Judge Kehoe, Mrs. Sorg, Mr. Stolarski, I would like to try to attempt to strike some positive notes with the Court here. First, I would like to thank the Court for the fair manner in which the trial was conducted. At the bond hearing I understood when you agreed with the prosecution that there was some flight risk because of the sentence I faced. But I am not the sort of

person who would do anything to jeopardize the homes of my loved ones for the sake of my freedom.

Looking over ones shoulder constantly would not really be freedom anyway. As you know, the home where my wife resides are only property as well as my parents sole residence are on the lines with my bonds.

Also my cousin, David, who is closer than a brother than me has his assets are on the line as well with the personal surety bond. Unfortunately, because my bond was not continued, I was unable to complete my last course at Florida International University in which I was enrolled at the time of my trial.

This would have completed my requirements for graduation with a bachelor of arts in parks and recreation management had I been allowed to stay out until now.

As far as your impression of me being a danger to the community, I would like to tell you a few things about myself, some of which are reflected in my resume under the heading of volunteer work experience, a copy of which should have been attached to the PSI. Perhaps I can sway your opinion somewhat.

Since 1972 I have been a certified as an interscholastic athletic official in swimming, diving and wrestling. I have officiated numerous high school, college and age group events, most of them on an unpaid basis.

I am also a YMCA level two swim official. During much of my employment I was a water safety instructor and lifeguard, and I have made numerous rescues during that employment and saved quite a few lives. I was also certified as a water safety instructor and a handicapped instructor for the Red Cross.

I have instructed the retarded and the physically handicapped, as well as helping to prepare these individuals for participation in the special olympics.

I have worked for performing arts for community and education known as PACE hear locally as a production and security volunteer and was one of select few volunteers

given a special certificate for my outstanding contributions to that organization.

It was left in the courtroom on the certificate, that is, on the last day of my trial and I am told it has not been located.

I have also given countless hours of my time to the southwest YMCA as a part of one of my internships. I helped to build the soccer program there. I recruited quite a number of voluntary coaches including Bob Grisi. His son participated in the program at the time.

I also worked extensively with the pool operation in the aquatics program. I was also certified by the American Heart Association as a CPR instructor. This valuable skill being passed on has enabled many people with no other medical training to save lives by providing basic life support until qualified medical help arrives on the scene of an emergency or heart attack.

I have taught CPR in many locations throughout the county. I taught some classes from 1979 to 1982 to dive master candidates in Coconut Grove scuba shop where I received my advanced open water certification from Patty.

Interestingly enough, Mr. Stuart Sorg, the husband of the prosecutor owned and operated this shop; a small world, Your Honor.

I am a member of quite a number of environmental organizations, including Green Peace, Couste Society, the Nature Conservancy, Natural Resources, defense counsel, the Center for Marine Conservation, and the Florida Audubon Society.

I also support WLRN public radio. In December of '88 a friend of mine had his month motorcycle stolen. He is a French chef at the Fontainebleau Hilton. A couple of days later, while riding on Miami Beach, I spotted the bike. I chased the thief down. Forcing him to park the vehicle. Unfortunately the thief got away, but I was able to recover the bike for my friend. If necessary I could provide the case number to the Court for verification.

These are just some of my good works, Your Honor. I have always given freely of my time to the community. I like to think of myself as being an asset to the community; not a danger.

I was interested to read your remarks in the Miami Herald about Monty Trainor's sentencing hearing. Not to compare myself to a citizen of his stature, but I believe that I too am a man who knows how to do the right thing.

While I may not have contributed monetarily to the degree that he has, I have given very generously of my time to this community.

While I have been at MCC I have been made lead orderly and law librarian in my unit. I have tried to make the best use of my time there, but it is my sincere hope I can soon be outside again to be an asset to my wife and family and to the community at large. Thank you once again for your time.

THE COURT: Do you care to make a presentation?

MR. ENTIN: In addition to what Mr. Brown said, may I hand up another copy of the letter on behalf of Mr. Brown from the City attorney of Pacificia, California. I think you know Mr. Ken Swarz from the public defenders offices, acquainted with Mr. Brown and personally he would like to say a few words.

THE WITNESS: Let me explain how I fall in. I grew up in a town called Scranton, Pennsylvania. Scranton is about 20 minutes away from Wilkesbury, where Mr. Brown was born and raised.

I have a friend to this day still a friend of mine. He was a friend since I was about this big. You can imagine, there was a time. His name was Steven Miller. He and I were best friends then and today we are like brothers.

We went to everything from Hebrew school together. We were boy scouts together; high school together. We were college roommates at Penn State, and we remained very good friends to this day.

In two weeks I am going to go visit him. He is a dentist in Pittsburgh, Pennsylvania. He lives with his wife and new born baby. Steve Miller is first cousin's with Jeff Brown. As far back as I can remember Steve and Jeff were very good friends. They were like brothers. He had no brothers. Jeff has no brothers.

They were very good close cousins, like brothers. They are both from families which have a very strong value of being close to their families and concerned to their families and concerned for their families, and consequently they were always involved in each others activities. They spent time together growing up. It was important for their families to have close contacts with their children.

I know Steve's mother. I know her very well because I grew up together. I know Jeff's mother. I met her a few times although I am not as well acquainted. I can tell you something about his aunt. They are very good people. I know his mother is one of the finest and his father, Sidney Brown, is one of the finest people I know.

Jeff's father has suffered a heart attack in recent years. He is not as well as he could have been. But I know through the years they have always been besides Jeff in all the problems he has had.

Steve, who has been like a brother, has tried the best he could to stay in touch with Jeff and remain in contact with him, and as to stand with him and support him. My contact with Jeff has really not been that close. He has been living in this area. We have not remained in contact, but I know that speaking from experience, Judge, I have to tell you that speaking as a witness is a lot harder than speaking as an attorney.

I have a deep appreciation for doing that. I know this Court has very little discretion. You are bound by the guidelines. I know there is not a heck of a lot you can do. But to the extent that it would help, Judge, I know that the Court does take into consideration a person's family and the

background and their family network and the support they can get.

I can tell you from a personal experience that Jeff has a lot of good family, fine people. I mean people who are just very well known and well respected in their community that are concerned about Jeff. And though they are not particularly happy about what is happening, I think once they get over the shock, they will remain with him. He is a young man, one day when he gets out, they will be there to see that he gets back on his feet. So to the extent that he has people, Judge, there is hope for Jeff when he gets back into the community.

I know that if his sentencing were held in the area of Pennsylvania where most of his family still resides, I know his father is being ill it would be very difficult for him to come and sit and observe. But I know as far as Steve goes, he is concerned about what will happen to Jeff.

And I know that one day when he gets out he will remain a cousin and a friend to Jeff, and one day when he gets out, those people will be beside him, Your Honor, so I can only ask that the Court bear in mind Mr. Brown comes from a good family.

I also know that he has always been interested in athletics and sports. He has talked about his having taught sports. I remember I was in high school. Jeff was about a year older. He was on the swim team. I tried to go out for swimming, Judge, from my high school. I was the slowest man on the team. They used to joke when I would swim laps, they would time me with a calendar instead of a stop watch. It was embarrassing, but I tried.

I know because of being involved in swimming I knew Jeff was a fine swimmer for his high school in Wilksbury. He was always teaching and helping others learn swimming. I guess all I can say there what I know is a good side of Jeff. A side that is concerned for people who are not as advantaged as he is in the skills that he has.

To the extent that I can help, Your Honor, I do hope the Court does give some consideration. Thank you.

THE COURT: Anything further, Mr. Entin?

MR. ENTIN: I will be brief. Like Mr. Swarz I realize that the Court does not have a whole lot of discretion anymore. I remember when Federal Judges used to have a lot of power.

THE COURT: It was not in the last ten years.

MR. ENTIN: They have taken a lot of that away from you.

THE COURT: As far as sentencing, they can have it.

MR. ENTIN: I don't think the Court really means that. I think this would be the sort of case where the Court could exercise some real discretion if the Court had ability.

THE COURT: What discretion do I have with the enhancement?

MR. ENTIN: In all all honesty if you did not grant my motion. You have no discretion whatsoever. None. I am not disagreeing with that. Maybe I just want to stand up here and scream and cry and beat my fist on the podium. I feel that with the enhancement, with the mandatory minimums and guidelines we all sort of become irrelevant when it becomes time for sentencing you can be replaced by a computer.

I can be replaced by a score sheet between the two of us. Neither of us have to be here. It is kind of silly. Here Your Honor has just heard that there is a lot of good to Jeffrey Brown, number one. No. 2, the Court has been a trial Judge for more years than I have been a lawyer, whether the Court wants to admit or whether Miss Sorg wants to admit when the jury came book with the verdict, they were troubled by the case because it was a clear compromised verdict.

Juries are entitled to gamble compromise verdicts. They have been doing it since I have been practicing. They acquitted Jeff in two counts and acquitted him in one. It does not make a difference. It makes no difference. Here is

a fellow who has a great deal of good in him, a great deal to offer a fellow who has a decent background, and who stand convicted of his second crime 15 years after his first crime, and this Court has no discretion but to sentence him to 20 years in jail.

There has to be something wrong somewhere. I would only ask that the Court, before imposing sentence on Mr. Brown, maybe says a couple of things to him and shares with him maybe some of the Court's experience, I can't ask the Court to do any more for him because the Court can't. I will ask the Court to give him the minimum which is the 20 years.

Recognizing that that is much higher than the guidelines would have called for for the same offense which also took into account, Your Honor, that his criminal history conduct, and that is basically what I have to say to the Court.

THE COURT: Government.

MS. SORG: First of all, I would like to suggest to the Court that this may not be one of those cases where but for the fact that the Court feels its hands are tied, it would impose a much lesser sentence.

The Guidelines don't take into effect the fact that this was a drug felony. The legislature has taken that into account. What we have here is an individual who has had every advantage. They have lived in this country all their lives. They had the support of a kind, generous, loving family.

They had the advantage of education. Mr. Brown is a very articulate individual. And instead of doing as he suggested to the Court, being such a contribution to this community, Mr. Brown has chosen instead to introduce two kilograms of heroin into this community.

If such an individual cared too much about the community, then I submit to this Court that they would not have introduced heroin into the community. In this case, the 20 year minimum mandatory sentence, which is what the Government is also asking the Court to impose is not an

unfair sentence. Once again, the people of this country are just sick and tired and fed up with individuals who over and over again go back to making the easy buck and not caring about the affect of what this poison is doing to our society.

Under these circumstances, particularly in light of an individual such as Mr. Brown, we don't have an uneducated alien from another country, who had no idea what was going on, just did something because his family was starving.

We have here an educated person who has had every advantage; who, instead turned the other way. This is not Mr. Brown's first experience with drugs. He has been given every chance, but instead chose this one. I submit to the Court this is not an unfair sentence. The Government is recommending the 20 year minimum sentence. Thank you.

THE COURT: Any response, counsel?

MR. ENTIN: It would not mean anything if I gave a response.

THE COURT: Would you and your client come to the microphone.

After consideration of the statement, does probation care to make any notation or anything whit reference to the enhancement should-you not be involved in that process?

THE PROBATION OFFICER: I apologize, I am not familiar with the files. Miss Ford is out today. I just learned of in advance from your court clerk as we were sitting here.

THE COURT: We just heard about it last week. Put it over to this week. Whoever was here last week should have told somebody.

MS. SORG: I can tell the Court Miss Ford does know about this, Your Honor. We had discussed this.

THE COURT: I think the presentence report ought to reflect the enhancement provision.

THE PROBATION OFFICER: The report could be modified. I can see to that.

MR. ENTIN: It did not reflect the enhancement.

THE COURT: I know it did not. That's why I did not know. I did not know there was a question of enhancement, which is my fault. It is in the file. I found it by going to the file.

THE COURT: Let's do modify the presentence report to show that the enhancement is a statutory 10 year minimum mandatory enhancement to 20 years.

After consideration of the statements of all the parties, a view of the presentence investigation, the severity and the significance of the instant offense, the Court finds the enhancement is mandated upon this Court, and the Court sentences you to the custody of the bureau of prisons for a period of 20 years.

I will further order a five year supervised release term at the conclusion of the sentence, $50 assessment and a fine of $10,000.

Sir, are you aware that you have an absolute right to file an appeal from these proceedings together with the judgement of sentence.

MR. ENTIN: The fine is not mandated by the statute. That is something within the Court's discretion. I would ask the Court to please reconsider the fine, predicated on the facts of this case which include the defendant's wife is not going to be saddled with all the obligations of the home for at least 16 years, based on the present parole considerations.

I think it would strip from Mrs. Brown any ability to maintain whatever assets Mr. Brown has. I don't think the record shows that Mr. Brown accommodated any of these in anything but a perfectly legitimate and appropriate matter. There is no case of any history of drug dealing; no indication of a drug dealing lifestyle.

THE COURT: Probation, am I mandated when I find he has the ability to pay a fine, to impose a fine?

THE PROBATION OFFICER: I believe so. Unfortunately this is the first time I ran into this.

THE COURT: I believe we are back to another mandate again.

MR. ENTIN: Not really, because it requires you to make certain findings in making a determination he has the ability to pay the fine. One of those findings that the court has to do.

THE COURT: It shows he clearly has the ability to pay a fine.

MR. ENTIN: The Court has to balance the dollars that he shows in his assets column by the ability of the family to support itself during the time period that he would be away. You are unable to make that balancing test. You can find that based upon the length of the sentence and amount of assets that exist that the family would not be able to support itself for that period of time.

Thus fall into the definition of inability to pay the fine. I would be happy to brief this issue for you, Judge, because I think that clearly is within the statute, under the circumstances, clearly gives the Court the ability in that one area to do a balancing test and do a measuring test before assessing the fine.

THE COURT: Government.

MS. SORG: In this case, I believe the probation department found Mr. Brown has liquid assets that could be liquidated amounting to $19,000. I feel under the circumstances $10,000 is a very reasonable fine. It takes half of Mr. Brown's like liquid assets. The other half would be left for his wife to utilize. Under the circumstances the Government suggests that is a very reasonable fine.

MR. ENTIN: What probation did not take into account, there is about a balloon mortgage on the family home. The only significant assets that will have to be paid within the next 24 months that will take up the biggest portion of these assets.

I don't think Congress intended for the Court to leave a dependant of a person who was sentenced in these cases

penniless and homeless. I don't think that was what Congress was doing.

If the Court has any question rather than imposing a fine at this time, allow me to brief the issue.

THE COURT: I will go ahead and enter the fine of $10,000. You file something, a motion to strike it and I will consider it; maybe strike it from the J and C. Enter amended J and C. You understand you have a right to appeal all these proceedings?

THE DEFENDANT: Yes.

THE COURT: You must do so within 10 days from today's date.

MR. ENTIN: I will file it with Mary now, Your Honor.

THE COURT: Remand the defendant to the custody of the Marshall.

THE COURT: I don't know how the Judge may know about it if you don't go through every file checking these if somebody does not tell us.

MS. SORG: You mean about filing the notice of enhancement?

THE COURT: Yes.

MS. SORG: There is no prohibition other than every time we file something, courtesy copies are sent once it is docketed in the clerks office; courtesy copies are sent up to judge's chambers.

THE COURT: Did that happen here, do you no?

THE CLERK: If it did it is such a long time.

THE COURT: Maybe it happened. I am not saying it did not.

MS. SORG: Perhaps an announcement, your Honor, at the beginning of the trial that the Government filed.

THE COURT: I think the biggest thing, the time we start the trial and with probation. Probation did not know about this.

MS. SORG: If I could, Miss Ford and I discussed this. It was her opinion as well as it was mine that really the two were separate, and I discussed with her the various factors that were contained in her PSI.

THE COURT: Probation is not interested in 20 years.

MS. SORG: What she said is that is really not your department. We have nothing to do with the enhancement, so that was her position under the circumstances, and I gather that is why there was nothing contained in the PSI.

THE COURT: Mr. Probation officer, if that is the general view of the probation office tell them to change the review.

THE PROBATION OFFICER: I assure you that is not my review. You read many of my reports. I would include the Government has filed notice, even if it was not ruled on.

THE COURT: Let me know it.

MR. ENTIN: Could I ask you to entertain a motion for bond pending an appeal.

THE COURT: Yes, I will entertain a motion.

MR. ENTIN: May I file it in writing during the next five days.

THE COURT: I will always entertain it. That's whether you asked for.

MS. SORG: Is that a committed or uncommitted fine?

THE COURT: I will wait to read your motion.

I CERTIFY THIS TRANSCRIPT IS TRUE AND ACCURATE

11-24-89 \s\ _____
PAUL HAFERLING

**EXHIBIT 2**

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA CRIMINAL**

COMMONWEALTH : No. 1974 - 335

v. :

JEFFREY BROWN :

Entered: April 19, 1976

**ORDER**

AND NOW, April 19, 1976, upon the recommendation of defendant's probation officer, and it appearing to the Court that defendant has been of good behavior, JEFFERY BROWN is hereby released from probation and any further supervision of the State Board of Probation and Parole.

BY THE COURT:

\s\ _____

P.J.

**EXHIBIT 3**

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA :
:
v: :
:
JEFFREY BROWN :

Criminal No. 1974-335

PETITION TO EXPUNGE ARREST RECORDS

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

AND NOW, comes Jeffrey Brown, by his attorney, Joseph L. Amendola, petitioning for the expungement of his arrest record for the following reasons:

1. May 21, 1974, the Pennsylvania Department of Justice, Bureau of Drug Control, filed a complaint against Petitioner charging him with possession of a controlled substance with intent to deliver and delivery of a controlled substance.

2. Petitioner was subsequently fingerprinted and photographed by police officials.

3. Petitioner subsequently received treatment and rehabilitation under Section 18 of Act 64 and was placed on three (3) years probation.

4. Petitioner was released from probation on April 4, 1976.

5. Under the terms and conditions of Section 18 of Act 64 (35 Pa.C.S.A. Section 780-118) after the Petitioner completed his probationary period, the charges previously

filed against him should have been dismissed, but, in fact, the charges were never dismissed.

6. Petitioner wishes to be free from this arrest record in the future as it may prejudice him in future employment opportunities.

7. Petitioner wishes to b free from the fear and reality that this arrest record may and probably will cause him embarrassment and the possible loss of employment opportunities in the future.

8. The Commonwealth has no interest in retaining the arrest record of the Petitioner as he in fact did fully comply with the terms of the Section 18 disposition.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court direct that the Pennsylvania Department of Justice, Bureau of Drug Control, and District Justice of Magisterial District 49-3-01 expunge their records of any record of Petitioner's arrest on the charge of driving under the influence of alcohol in this matter and that the Court Administer delete from her records and destroy any reference to the said charges of possession of a controlled substance with intent to deliver and delivery of a controlled substance with which the Petitioner was charged on or about May 21, 1974.

Respectfully Submitted,

By: \s\ _____

Joseph L. Amendola, Esq.
Attorney for the Defendant
204 Calder Way, Suite 406
State College, PA 16801
814-234-6821
Attorney I.D. No. 17667

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA :
:
v. :
:
JEFFREY BROWN :

Criminal No. 1974-335

CERTIFICATE OF SERVICE

AND NOW, this 8 day of April, 1991, I, Joseph L. Amendola, hereby certify that I have this date, served a copy of the foregoing document, by causing same to be either hand-delivered or mailed by U.S. mail, first class, postage prepaid, to Ray F. Gricar, District Attorney, Centre County Courthouse, Bellefonte, PA 16823.

\s\ _____
Joseph L. Amendola, Esquire

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA :
:
v: :
:
JEFFREY BROWN :

Criminal No. 1974-335

PETITION FOR DISMISSAL OF CRIMINAL CHARGES

The Defendant, Jeffery Brown, by his attorney, Joseph L. Amendola, hereby petitions the Court of Common Pleas of Centre County to dismiss the criminal charges filed against him for the following reasons:

1. The Petitioner completed treatment and rehabilitation and was placed on probation under Section 18 of Act 64, 35 P.S. Section 780-118. A copy of the Courts' Sentencing Order is attached as Exhibit A.

2. Under the terms and conditions of 35 P.S. Section 780-118 (e) after the Petitioner completed his probationary period, the charges against him should have been automatically dismissed. A copy of the Order releasing the Petitioner from probation is attached as Exhibit B.

3. For reasons unknown to the Petitioner, the charges against him were never dismissed.

WHEREFORE, the Petitioner respectfully requests that the Court direct that the said charges be dismissed.

AMENDOLA & KNEPP

\s\ _____

By: Joseph L. Amendola, Esq.
Attorney for the Petitioner
204 Calder Way, Suite 406
State College, PA 16801
814-234-6821
Attorney I.D. No. 17667

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA :
:
v. :
:
JEFFREY BROWN :

Criminal No. 1974-335

CERTIFICATE OF SERVICE

AND NOW, this 8 day of April, 1991, I, Joseph L. Amendola, hereby certify that I have this date, served a copy of the foregoing document, by causing same to be either hand-delivered or mailed by U.S. mail, first class, postage prepaid, to Ray F. Gricar, District Attorney, Centre County Courthouse, Bellefonte, PA 16823.

\s\ _____
Joseph L. Amendola, Esquire

**EXHIBIT 4**

**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA :
:
v: :
:
JEFFREY BROWN :

Criminal No. 1974-335

**ORDER**

Entered: April 18, 1991

AND NOW, to wit, this 18th day of April 1991, upon consideration of the petition of Joseph L. Amendola, Attorney for Petitioner, it is hereby Ordered, Adjuged and Decreed that:

1. The Prothonotary of Centre County shall serve a certified copy of this Order upon the following keepers of records pertaining to criminal proceedings instituted against the Petitioner on May 21, 1974 by Pennsylvania Department of Justice, Bureau of Drug Control, to:

(a) Records Custodian, Pennsylvania Department of Justice, Bureau of Drug Control;

(b) District Justice of Magisterial District 49-3-01;

(c) Maxine Ishler, Court Administrator, Court of Common Pleas of Centre County.

2. The aforementioned keepers of criminal records shall forthwith on receipt of this Order:

(a) Expunge and destroy the official and unofficial arrest and other records of Petitioner pertaining to the above-mentioned criminal proceedings;

(b) Request the return of such records as have been made available to the federal and state agencies pertaining to the above-mentioned charge;

(c) File with the Court within thirty days an Affidavit that such records have been expunged and destroyed and with it return this expunction Order; and

(d) Notify Petitioner's attorney, when (c) above has been completed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

Upon receipt of such Affidavits, the Prothonotary of Centre County shall seal the same together with the original and all copies of this Order and shall not permit any person or agency to examine such sealed documents.

BY THE COURT:

\s\ _____

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF CENTRE : SS
:

I HEREBY CERTIFY THAT ALL OFFICIAL AND UNOFFICIAL RECORDS OF ARREST OR PROSECUTION AND OTHER CRIMINAL RECORDS MAINTAINED BY THIS OFFICE WITH RESPECT TO THE ABOVE NAMED INDIVIDUAL AND CHARGES HAVE BEEN EXPUNGED AND DESTROYED AND THIS OFFICE OTHERWISE HAS COMPLIED WITH THE TERMS OF THIS ORDER.

_____
Name

_____
Title

SWORN AND SUBSCRIBED
BEFORE ME THSI _____
DAY OF _____,
199_.

_____
Notary Public

**EXHIBIT 5**

**PENNSYLVANIA STATE POLICE**
**OFFICE OF CHIEF COUNSEL**
**1800 ELMERTON AVENUE**
**HARRISBURG, PA 17110**
**(717) 783-5568**

September 14, 1995

Jeffrey A. Brown
15801 SW 137 Avenue
34443-004-G
Miami, FL 33177

Dear Mr. Brown:

I have been asked to respond to your letter of September 10, 1995, concerning requested expunction of criminal records in your name. Please be advised that the records were expunged on September 8, 1995, by a clerk of the Pennsylvania State Police. We have also forwarded the expunction order to the FBI to remove said files on September 13, 1995. A copy of the expunction affidavit was forwarded to Attorney Joseph Amendola on September 8, 1995. If you have any further questions on the above, please advise.

Sincerely,

\s\ _____
Andrew B. Kramer
Chief Counsel

ABK: jh

**EXHIBIT 6**

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20537

October 13, 1995

Mr. Jeffrey A. Brown, 34443-004
Post Office Box 979137
Miami, Florida 33197

Dear Mr. Brown:

Reference is made to your most recent letter dated October 2, 1995, with enclosures, addressed to Ms. Debra Ann Driscoll of my staff, concerning your arrest record.

Based on the information we have previously received from the Pennsylvania authorities, the fingerprints taken in connection with your arrest dated May 20, 1974, have been deleted from our Criminal File. The destruction of the fingerprint card results in the complete expunction of that arrest data from our file. You may obtain a copy of your FBI identification record as it currently appears in our files by complying with the requirements contained in the enclosed copy of United States Department of Justice Order 556-73. I am enclosing an applicant fingerprint card for your use if you decide to pursue that course. Your enclosures are returned.

Sincerely yours,

\s\ _____

Donald A. Flynn
Section Chief
User Services Section
Criminal Justice Information
Services Division

Enclosures (6)

**MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY**

**UNITED STATES DISTRICT COURT**

**District:** Southern District of Florida

**Name of Movant:** Jeffrey A. Brown

**Prisoner No.:** 34443-004

**Case No.:** 89-153-Cr-KEHOE

**Place of Confinement:** FCI Miami

UNITED STATES OF AMERICA v. JEFFREY BROWN

**MOTION**

1. **Name and location of court which entered the judgment of conviction under attack:**
United States District Court, Southern District of Florida, Miami Division

2. **Date of judgment of conviction:**
July 7, 1989

3. **Length of sentence:**
20 years

4. **Nature of offense involved (all counts):**
21 USC 841 (a) (1) and 18 USC 2

5. **What was your plea?**
(a) Not guilty

6. **If you pleaded not guilty, what kind of trial did you have?**
(a) Jury

7. **Did you testify at the trial?**
No

8. **Did you appeal from the judgment of conviction?**
Yes

9. **If you did appeal, answer the following:**

(a) **Name of the court:**
Eleventh Circuit Court of Appeals
(b) **Result:**
Affirmed
(c) **Date of Result**
June 6, 1990

10. **Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?**
No

12. **State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.**

**Caution: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.**

**For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.**

**Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.**

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b)

A. **Ground one:**
Sentence must be reopened pursuant to U.S. v. Custis, 114 S.Ct. 1732 (1994).

**Supporting FACTS (state *briefly* without citing cases or law):**

Please see accompanying Memorandum of Law.

14. **Do you have any petition or appeal now pending in any court as to the judgment under attack?**
No

15. **Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:**

(a) **At preliminary hearing:**
Paul Lazarus, 800 Brickell Avenue - Penthouse #2, Miami, Florida 33131

(b) **At arraignment and plea:**
same as (a)

(c) **At trial:**
Alvin Entin, 200 East Broward Boulevard, Suite 1210, Fort Lauderdale, Florida 33301

(d) **At sentencing:**
same as (c)

(e) **On appeal:**
Same as (c) and (d) above

16. **Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?**
No

17. **Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?**
No

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/_____
Signature of Attorney (if any)
PAUL MORRIS

999 Ponce de Leon Blvd.
Suite 550
CORAL GABLES, FL 33134

I declare under penalty of perjury that the foregoing is true and correct. Executed on 4-8-96.

/s/Jeffrey O. Brown
Movant

Supreme Court, U.S.
FILED
SEP 23 1999
OFFICE OF THE CLERK

(2)

No. 98-2059

# In the Supreme Court of the United States

JEFFREY BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*

JAMES K. ROBINSON
*Assistant Attorney General*

SANGITA K. RAO
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

22pp

## QUESTIONS PRESENTED

1. Whether 21 U.S.C. 851(c) precludes a defendant from bringing a post-conviction challenge to a sentence imposed under 21 U.S.C. 841(a)(1) that was enhanced by a prior state conviction, on the ground that the prior state conviction was later expunged on non-constitutional grounds.

2. Whether 21 U.S.C. 841(a)(1) permits a sentence to be enhanced by a prior state conviction that was later expunged, where the expunction was based on the fact that the defendant had successfully completed a probationary term, rather than for reasons related to the constitutionality of the conviction, the innocence of the defendant, or legal error.

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# In the Supreme Court of the United States

No. 98-2059

JEFFREY BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The order of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 170 F.3d 188 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on January 28, 1999. On March 26, 1999, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 28, 1999. The petition for a writ of certiorari was filed on June 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District of Florida on one count of possessing at least one kilogram of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Because he had a prior state conviction in Pennsylvania for a felony drug offense, petitioner was subject to a mandatory minimum sentence of 20 years' imprisonment pursuant to 21 U.S.C. 841(b)(1)(A), which the district court imposed on September 12, 1989. Gov't C.A. Br. 1-2.

On April 18, 1996, petitioner filed a motion under 28 U.S.C. 2255 seeking to vacate his federal sentence on the ground that after his federal conviction had become final, Pennsylvania had expunged the prior state conviction used to enhance his federal sentence. The magistrate judge issued a report and recommendation recommending that the motion be denied. The district court adopted the magistrate judge's report and recommendation and denied petitioner's motion. The court of appeals affirmed in an unpublished order. Gov't C.A. Br. 2-3; Pet. App. 1; *id.* at 2-7.

1. On April 2, 1974, petitioner was charged in the Court of Common Pleas of Centre County, Pennsylvania, with multiple felony counts of delivering and possessing with the intent to deliver quantities of LSD and marijuana. Petitioner entered a guilty plea, and on October 1, 1974, he was sentenced to a term of imprisonment of not less than three months, nor more than three years. The judgment further provided that in view of petitioner's status as a drug abuser and his request for treatment and rehabilitation, the imposition of the sentence of imprisonment would be "deferred" and petitioner placed on a period of probation requiring

him to undergo treatment at a drug rehabilitation center, to be followed by a stay at a mental health facility. Gov't C.A. Br. 3. Pennsylvania law provides that in such instances, a criminal charge may be held "in abeyance" during the probationary period and at the expiration of the period be "automatically dismissed." Pa. Stat. Ann. tit. 35, § 780-118(e) (West 1993). Petitioner completed his prescribed probation, and on April 19, 1976, an order was entered in the Court of Common Pleas releasing him from further supervision. No order of dismissal, however, was entered and the case remained a matter of public record. Gov't C.A. Br. 3-4.

2. On March 31, 1989, petitioner was charged in the United States District Court for the Southern District of Florida with conspiring to possess at least one kilogram of heroin with the intent to distribute it, in violation of 21 U.S.C. 846, possessing at least one kilogram of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Gov't C.A. Br. 4. Section 841(b)(1)(A) of Title 21, in pertinent part, provides a mandatory minimum sentence of ten years' imprisonment upon conviction of a Section 841(a)(1) offense involving more than one kilogram of heroin. In addition, the statute provides for enhanced punishment for recidivist offenders: "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years." 21 U.S.C. 841(b)(1)(A). Section 851 of Title 21 sets out the procedures for establishing the prior convictions used as a basis for sentence enhancement. In accordance with Section 851(a), before trial the government filed an information identifying petitioner's

prior Pennsylvania drug conviction and advising petitioner of its intention to seek an enhancement of sentence on that basis. Gov't C.A. Br. 4.

After a jury trial, petitioner was convicted on the Section 841(a)(1) offense and acquitted on the other two charges. Before sentencing, petitioner moved to dismiss the prior felony offender information. Petitioner contended that Section 851(a)(2) recognizes as predicate felony offenses only those charged by means of indictment, thus excluding petitioner's Pennsylvania crime, which was presented by means of information. The district court denied the motion and, after petitioner admitted to having been convicted of the prior Pennsylvania drug felony, imposed the mandatory minimum 20-year sentence of imprisonment under Section 841(b)(1)(A). Petitioner appealed the judgment of conviction, but did not contest the propriety of his sentence. Gov't C.A. Br. 4-5. On June 6, 1990, the court of appeals, without opinion, affirmed the conviction. See *United States* v. *Brown*, 907 F.2d 1143 (11th Cir. 1990) (No. 89-6008) (Table).

3. In April 1991, almost two years after the imposition of his federal sentence, petitioner petitioned the Pennsylvania Court of Common Pleas to enter an order of dismissal of his previous drug conviction in accordance with state law and based upon his successful completion, in 1976, of his probationary term. On April 18, 1991, the petition was granted and an order was entered expunging and destroying the official and unofficial records of petitioner's 1974 felony drug conviction pursuant to Pa. Stat. Ann. tit. 35, § 780-119(a) (West 1993).[1] Gov't C.A. Br. 5.

---

[1] The Pennsylvania expunction statute provides in part:

Some five years later, on April 18, 1996, petitioner filed a motion under 28 U.S.C. 2255 asking the district court to set aside and vacate his federal sentence on the ground that the expunction of his Pennsylvania conviction retroactively invalidated his adjudication as a prior felony drug offender and entitled him to be resentenced without the recidivist enhancement. Gov't C.A. Br. 5-6.

Following a hearing, the magistrate judge issued a report and recommendation recommending that the motion be denied. The report observed that Section 851(c) "establishes a procedure for attacking the constitutional validity of a conviction which the Government seeks to use to enhance sentence," but that "there is no similar vehicle [for] challenging convictions where the charges have been dismissed and the record expunged years after the date of conviction." Pet. App. 6-7. The report concluded that "[s]ince [petitioner] does not contend that his conviction was invalidated by the State Court on constitutional grounds, he cannot prevail in an attack on that conviction pursuant to 21 U.S.C. § 851(c)." *Id.* at 7.

---

> Any expunged record of arrest or prosecution shall not hereafter be regarded as an arrest or prosecution for the purpose of any statute or regulation or license or questionnaire or any civil or criminal proceeding or any other public or private purpose. No person shall be permitted to learn of an expunged arrest or prosecution, or of the expunction, either directly or indirectly. Any person, except the individual arrested or prosecuted, who divulges such information in violation of this subsection shall be guilty of a summary offense and shall, upon conviction thereof, be punished by imprisonment not exceeding thirty (30) days or a fine not exceeding five hundred dollars ($500) or both.

Pa. Stat. Ann. tit. 35, § 780-119(b) (West 1993).

In addition, the report concluded that, even if it "were to infer that an expunged conviction is subject to challenge" notwithstanding Section 851(c), petitioner would not be entitled to relief, "based on the reasoning of [*United States* v.] *Cox*[, 83 F.3d 336 (10th Cir. 1996)]." Pet. App. 7. The *Cox* court ruled that a prior conviction expunged under state law should not be used in calculating a defendant's criminal history score under the Sentencing Guidelines if the conviction is "reversed or vacated for reasons related to constitutional invalidity, innocence, or errors of law," but "when convictions are set aside for reasons other than innocence or errors of law, such as to restore civil rights or remove the stigma of a criminal conviction, those convictions are counted." *Id.* at 5-6 (citing *Cox*, 83 F.3d at 339-340 and Sentencing Guidelines §§ 4A1.2, 4A1.2(j) & comment. (nn. 6, 10). Here, petitioner's record was expunged "based on his successful completion of a drug diversion program, and not as the result of constitutional invalidity, innocence or error of law." Pet App. 6. Accordingly, the magistrate's report concluded that, even if petitioner were entitled under Section 851(c) to challenge his prior conviction on the ground that it was "expunged," on the facts of this case the dismissal of petitioner's state felony conviction did not disqualify it as a prior felony drug conviction for purposes of his federal sentence under Section 841(a)(1) itself. *Id.* at 7.

The district court adopted the magistrate judge's report and recommendation and, on November 18, 1997, entered an order denying the Section 2255 motion. Pet. App. 2. The district judge granted petitioner a certificate of appealability. Gov't C.A. Br. 6.

4. The court of appeals summarily affirmed "for the reasons stated in the Report and Recommendation of the magistrate judge." Pet. App. 1.

**ARGUMENT**

1. Petitioner contends (Pet. 5-6) that review by this Court is warranted because the court of appeals' ruling in this case conflicts with decisions from other courts of appeals. The one-sentence, per curiam order of the court of appeals in this case, however, was unpublished. Under Eleventh Circuit Rule 36-2, "[u]npublished opinions are not considered binding precedent," although "[t]hey may be cited as persuasive authority." Because the court of appeals' decision in this case is not "binding precedent," it does not set forth the Eleventh Circuit's final and considered view on any issue. Thus, even if the decision of the court of appeals in this case were inconsistent with decisions of other courts of appeals, there would be no conflict that would warrant this Court's review.

2. In any event, the decision of the court of appeals does not conflict with any decision of any other court. In *Custis* v. *United States*, 511 U.S. 485 (1994), this Court held that a defendant had no right at sentencing to make a collateral attack on prior state convictions used to enhance a sentence imposed under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), except on the basis of denial of the right to counsel. The ACCA had no provisions for allowing a defendant to collaterally attack prior convictions. The Court went on to state that, if the petitioner in that case later made a successful collateral attack on his state convictions either in state court or on federal habeas review, "he may then apply for reopening of any federal sentence enhanced by the state sentences," but the Court stated

that it would "express no opinion on the appropriate disposition of such an application." 511 U.S. at 497.

Unlike the ACCA, the drug statute under which petitioner was convicted and sentenced sets forth specific procedures for challenging prior convictions used for enhancement purposes. 21 U.S.C. 841, 851. Specifically, Section 851(c)(2) of Title 21 provides:

> A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Here, the magistrate's report interpreted Section 851(c)(2) as expressing Congress's intent that all prior felony drug convictions should be used in determining a sentencing enhancement under Section 841(b)(1)(A), except those prior convictions that were constitutionally invalid. Since petitioner's conviction was not invalidated by the state court on that ground, the magistrate's report determined that petitioner's sentence "was properly enhanced under 21 U.S.C. § 841(b)(1)(A), and no reduction in that sentence is warranted." Pet. App. 7.

Petitioner asserts that he was "barred * * * from reopening his federal sentence despite his successful challenge to the state conviction which had been used to enhance his federal sentence." Pet. 6. To the extent

that petitioner is arguing that the magistrate judge's report was based on the premise that 28 U.S.C. 2255 bars collateral relief when a prior conviction used to enhance a sentence has later been invalidated, he is incorrect. The report did not conclude that Section 2255 relief was unavailable for such a claim. Rather, the report entertained petitioner's claim and then rejected it on the merits, ruling in its primary ground for decision that, because the prior state conviction had not been invalidated on constitutional grounds, it was properly used to enhance petitioner's Section 841(b)(1)(A) sentence. Pet. App. 7. No court of appeals has held differently.

None of the cases cited by petitioner (Pet. 6), *United States* v. *LaValle*, 175 F.3d 1106 (9th Cir. 1999); *United States* v. *Pettiford*, 101 F.3d 199 (1st Cir. 1996); *United States* v. *Cox*, 83 F.3d 336 (10th Cir. 1996); and *United States* v. *Nichols*, 30 F.3d 35 (5th Cir. 1994),[2] conflicts with the decision in this case. The ruling in this case turns on the interpretation of the limitation imposed on challenges to prior convictions contained in Section 851(c)(2). The report's alternative ground turns on whether a conviction expunged under state law constitutes a "conviction" for a prior felony drug offense under Section 841(b)(1), which does not specifically

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[2] Petitioner also relies on *United States* v. *Bacon*, 94 F.3d 158, 161 n.3 (1996), in which the Fourth Circuit in dicta noted that a defendant could seek to reopen his federal sentence if successful in overturning a prior state conviction used to enhance his sentence under the career offender provisions of the Guidelines. In *United States* v. *Kahoe*, 134 F.3d 1230 (1998), however, the Fourth Circuit stated that "whether a defendant is entitled to § 2255 relief if a district court relied upon a prior conviction to enhance a federal sentence and subsequently the prior conviction was set aside" remains an open question in that court. *Id.* at 1234 n.2.

disqualify expunged convictions from consideration. None of the cases cited by petitioner turns on Section 841 or Section 851, and all of the cases involve statutory schemes that, unlike the statute at issue here, expressly provide that expunged convictions may not be considered for enhancement purposes.[3]

Indeed, even if the cases cited by petitioner had arisen under Section 841, they would be fully consistent with the magistrate's report here. That is because none of the cases cited by petitioner holds or suggests that a prior conviction that, like petitioner's, was expunged for reasons unrelated to constitutional or other legal error or the defendant's innocence should be disregarded for purposes of a sentence enhancement. *Pettiford*, *Nichols*, and *Lavalle* deal with prior state convictions that were vacated on the basis of an involuntary guilty plea—a constitutional ground—rather than a conviction expunged because of successful completion of a probationary period, as in this case. As *Cox* explains,

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[3] *Pettiford* involved an enhanced sentence under the ACCA, 18 U.S.C. 924(e), which contains no specific procedure for collaterally attacking prior convictions and therefore does not contain the limitation found in Section 851(c)(2). In addition, the ACCA specifically provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." 18 U.S.C. 921(a)(20); see *Pettiford*, 101 F.3d at 201 (citing 18 U.S.C. 921(a)(20)); see also *Kahoe*, 134 F.3d at 1234 (explaining that the ACCA incorporates 18 U.S.C. 921(a)(20) by reference).

*Nichols*, *Lavalle*, and *Cox* involve prior convictions used in calculating a defendant's criminal history score or assigning career offender status under provisions of the Sentencing Guidelines that, in contrast to 21 U.S.C. 851, specify that "expunged" convictions "are not counted," Sentencing Guidelines § 4A1.2(j). See *Nichols*, 30 F.3d at 36; *Lavalle*, 175 F.3d at 1108; *Cox*, 83 F.3d at 339-340.

a prior conviction expunged under state law is not necessarily "expunged" for purposes of a federal sentencing statute, and the *Cox* court went on to conclude that a conviction is expunged under the Sentencing Guidelines for purposes of calculating a criminal history score only if it is reversed or vacated for reasons related to constitutional invalidity, innocence, or errors of law. *Cox*, 83 F.3d at 339. Citing *Cox*, the magistrate's report here came to the same conclusion with respect to a sentence enhancement under Section 841(b)(1)(A). See Pet. App. 5-6. Thus, the ruling in this case does not conflict with the decision of any court of appeals.

3. Petitioner challenges (Pet. 7-10) the interpretation of Section 851(c)(2) in the magistrate's report. The report interpreted Section 851(c)(2) as limiting the type of attack that could be made on prior convictions used to enhance a sentence under Section 841(b)(1)(A). According to the report's reasoning, since, under Section 851(c)(2), constitutional invalidity is the only basis to attack a prior conviction during the initial federal sentencing proceeding, a prior conviction invalidated on any other basis and at any later time is not disqualified from serving as a prior felony drug offense for purposes of sentence enhancement under Section 841(b)(1)(A). Petitioner contends that that interpretation conflicts with *Custis*, *supra*, and *United States* v. *McChristian*, 47 F.3d 1499 (9th Cir. 1995). Petitioner's contention is without merit.

The issue in *Custis* was whether a defendant may collaterally attack prior convictions used to enhance a sentence imposed under the ACCA at the federal sentencing proceeding. *Custis*, 511 U.S. at 487. In the course of determining that the ACCA did not authorize such attacks, the Court mentioned other statutes that did expressly permit such attacks, such as 21 U.S.C.

851(c). 511 U.S. at 491-492. In attempting to demonstrate a conflict with this case, petitioner relies (Pet. 9) on the Court's statement that "[t]he language of § 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so." 511 U.S. at 492. Contrary to petitioner's suggestion (Pet. 9), however, the Court in that passage was not limiting the applicability of Section 851(c) to the initial federal sentencing proceeding. Nor was the Court purporting to interpret the extent of any limitations Section 851(c) places on the type of attack that may be made to a prior conviction, either at the federal sentencing proceeding or thereafter. It was simply distinguishing between statutes that allow some attacks on prior convictions to be made at the federal sentencing proceeding and statutes that do not. The *Custis* Court's brief characterization of Section 851(c)(2) is not in conflict with the analysis in the magistrate's report.

Nor does *United States* v. *McChristian*, *supra*, conflict with the magistrate's report. In *McChristian*, the defendant was sentenced in October 1992 to an enhanced sentence for a federal drug offense under Section 841(b)(1)(A), based on a 1982 state conviction that the state court invalidated before the federal sentence was imposed. *McChristian*, 47 F.3d at 1502. Although the defendant tried to show the district court that a state trial court had invalidated the state conviction after he had been convicted but before a sentence had been imposed, the district court held that, under 21 U.S.C. 851(e), the defendant could not "challenge the validity of any prior conviction * * * which occurred more than five years before the date of the information alleging such prior conviction." 21 U.S.C. 851(e). The Ninth Circuit reversed, holding that

Section 851(e) did not bar a defendant from merely reporting to the federal sentencing court, before sentence was imposed, that a state court had invalidated the prior conviction. *McChristian*, 47 F.3d at 1503.

Petitioner contends (Pet. 9-10) that *McChristian* is in conflict with this case because, in the course of interpreting Section 851(e), the Ninth Circuit interpreted the word "challenge" in Section 851(c)(2) to mean a "full-blown, collateral attack in federal court on a prior conviction" rather than mere "reports of successful collateral challenges completed in state court." 47 F.3d at 1503. Even if the Ninth Circuit's interpretation of the word "challenge" is correct, however, it does not conflict with the ruling here, because the magistrate's report did not rely on the meaning of "challenge" in Section 851(c)(2). The only time "challenge" is used in Section 851(c)(2) is in the last sentence, which states that "[a]ny challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge." The magistrate's report did not rely on that sentence or otherwise deny petitioner's Section 2255 motion on the ground that he was bringing an untimely "challenge" to his prior convictions. Instead, insofar as it relied on Section 851(c)(2), the report denied petitioner's motion because his prior conviction was expunged for nonconstitutional reasons.[4] That holding does not conflict with anything

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[4] The magistrate's report did comment that, in contrast to the procedure set forth in Section 851(c) for challenging prior convictions before sentencing, "there is no similar vehicle [for] challenging convictions where the charges have been dismissed and

in *McChristian*.[5]

4. Petitioner argues (Pet 11-12) that his expunged conviction does not constitute a prior conviction for purposes of sentence enhancement under Section 841(b)(1)(A) because, under Pennsylvania law, his state court records have been destroyed and his prior Pennsylvania case, he asserts, "does not now exist," Pet. 12. Petitioner's reliance on state law to establish whether his prior conviction is a qualifying predicate felony under a federal statute is unavailing. Absent clear language directing reference to state law, federal law defines what constitutes a prior conviction under a federal statute. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111-112 (1983) ("Whether one has been 'convicted' within the language of the gun control statutes is necessarily * * * a question of federal, not state, law, despite the fact that the predicate offense

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the record expunged years after the date of conviction." Pet. App. 6-7. But we do not understand the report to have rejected petitioner's claim on that ground. Instead, insofar as it relied on Section 851(c)(2), it reasoned that "[s]ince the movant does not contend that his conviction was invalidated by the State Court on constitutional grounds, he cannot prevail in an attack on that conviction pursuant to 21 U.S.C. § 851(c)." Pet. App. 7a.

[5] Although the court of appeals did not rely on waiver in denying petitioner's Section 2255 motion, petitioner did not challenge his prior conviction in a timely manner. Petitioner simply ignored the existence of his Pennsylvania conviction for 15 years after it had become final. When he finally moved for its dismissal some two years after the imposition of the sentence in this case, his petition was granted in ten days. Plainly, the matter could have been presented to the sentencing court before the imposition of sentence and entry of the judgment. It was not. Petitioner waited another five years before raising the issue under Section 2255. Such dilatory conduct provides an additional reason why review by this Court is unwarranted.

and its punishment are defined by the law of the State."). In *Dickerson*, the Court determined that an individual's prior guilty plea in Iowa to a state crime disqualified that individual from obtaining a license to deal in firearms under 18 U.S.C. 922, which is applicable to persons "convicted" of certain crimes. The Court so held even though the state conviction had been expunged following completion of a successful probationary period. 460 U.S. at 122. The Court reasoned that "expunction under state law does not alter the historical fact of the conviction" and "does not signify that the defendant was innocent of the crime to which he pleaded guilty." *Id.* at 115.[6]

In keeping with *Dickerson*, the courts of appeals that have addressed the issue have uniformly held that a state's procedure in dismissing or expunging a previous state conviction does not invalidate that conviction for use by a federal court in imposing an enhanced sentence under 21 U.S.C. 841(b)(1).[7] The same result should

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[6] Congress amended 18 U.S.C. 922 in response to *Dickerson* to provide that "[w]hat constitutes a conviction" for purposes of the firearms laws in Chapter 44 of Title 18 "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. 921(a)(20); see *Beecham* v. *United States*, 511 U.S. 368, 369 (1994) (amended statute requires reference to the law of the convicting jurisdiction). While that choice-of-law clause thus produces a different result than reached in *Dickerson* for the statute at issue there, the interpretive principle of *Dickerson* was not disturbed.

[7] See *United States* v. *Meraz*, 998 F.2d 182, 183-185 (3d Cir. 1993) (a state offense for which sentence is deferred and charges dismissed after successful completion of probation constitutes a prior conviction under 21 U.S.C. 841(b)(1)(B)); *United States* v. *Campbell*, 980 F.2d 245, 251 (4th Cir. 1992) ("A sentence of probation, though subject to expunction, constitutes a 'prior sentence' for purposes of sentence enhancement."), cert. denied, 508

follow here, since petitioner's conviction was expunged for reasons unrelated to innocence or legal error. Petitioner's state court conviction demonstrates that he is a repeat drug offender, even though the state court's formal judgment of conviction has been expunged pursuant to state law. See *United States* v. *Meraz*, 998 F.2d 182, 185 (3d Cir. 1993) ("[W]hen an individual has been given an opportunity to reform his or her conduct and instead commits another crime, the imposition of an enhanced sentence is appropriate."); *United States* v. *Campbell*, 980 F.2d 245, 251 (4th Cir. 1992) ("To treat a deferred sentence as something other than a 'prior conviction' would 'completely frustrate the policy behind the enhancement provisions of the federal statute, i.e.,

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U.S. 952 (1993); *United States* v. *Cisneros*, 112 F.3d 1272, 1281-1282 (5th Cir. 1997) ("deferred adjudication" under Texas law constitutes prior conviction for 21 U.S.C. 841(b)(1)(A)); *United States* v. *Gomez*, 24 F.3d 924, 930 (7th Cir.) (expunction under state law does not alter the legality of the prior state conviction, which may be used for enhancement purposes under 21 U.S.C. 841(b)(1)), cert. denied, 513 U.S. 909 (1994); *United States* v. *McAllister*, 29 F.3d 1180, 1184-1185 (7th Cir. 1994) (a state offense for which defendant receives probated sentence, under a state statute which provides for "discharge and dismissal * * * [without] adjudication of guilt" after successful probation is a prior conviction under 21 U.S.C. 841(b)(1)); *United States* v. *Ortega*, 150 F.3d 937, 948 (8th Cir. 1998) ("deferred adjudication" followed by period of probation under Missouri statute constitutes predicate drug felony under 21 U.S.C. 841(b)), cert. denied, 119 S. Ct. 837 (1999); *United States* v. *Fernandez*, 58 F.3d 593, 600 (11th Cir. 1995) ("a state offense in which the defendant pleads *nolo contendere* and adjudication is withheld pending completion of probation constitutes a 'prior conviction' for purposes of the enhancement provision of 21 U.S.C. § 841"); *United States v. Mejias*, 47 F.3d 401, 403 (11th Cir. 1995) (defendant's plea of *nolo contendere* to state charge where adjudication was withheld is a "conviction" supporting an enhancement of sentence under Section 841(b)(1)(B)).

to penalize and deter repeat offenders.'") (quoting *United States* v. *Petros*, 747 F. Supp. 368, 376 (E.D. Mich. 1990)), cert. denied, 508 U.S. 952 (1993).[8]

Petitioner attempts to distinguish *Dickerson* based on his assertion that, under Pennsylvania law, his prior conviction "does not now exist," Pet. 12, while under the Iowa law at issue in *Dickerson*, expunction meant "no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law," Pet. 11 (quoting *Dickerson*, 460 U.S. at 115). Regardless of the merits of petitioner's argument that the Pennsylvania and Iowa statutes are distinguishable,[9] petitioner's argument fails because it relies exclusively upon the mechanics and the significance of the Pennsylvania expunction procedures. Absent a contrary statutory provision (see note 6, *supra*), whether a prior conviction counts for enhancement purposes for a federal sentence is determined by federal law, which does not turn on local practice. See *Dickerson*, 460 U.S. at 112 (what constitutes a conviction under federal law should be

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[8] *United States* v. *Beaulieu*, 959 F.2d 375, 380-381 (2d Cir. 1992), is not to the contrary. See Pet. 12-13. That case concerned the use of an expunged conviction in calculating a defendant's criminal history under Sentencing Guidelines § 4A1.1, not the use of an expunged conviction to enhance a sentence under Section 841(b)(1).

[9] Contrary to petitioner's assertion (Pet. 12), Pennsylvania does not, in fact, erase the historical fact of the conviction for all purposes. At the time of expunction, a separate list is maintained of those persons whose records were expunged "for the purpose of determining the eligibility of persons for the expunction provisions under this section and to be made available to any court upon request." Pa. Stat. Ann. tit. 35, § 780-119(a) (West 1993).

"unaffected by varying state laws, procedures, and definitions of 'conviction' ").

5. Petitioner argues (Pet. 10) that his federal sentence should be reopened based on fairness since, had the Pennsylvania procedures operated as they should have, neither the government nor the federal sentencing court would have known of his prior conviction, as there would have been no record of it. That contention does not merit further review by this Court. Petitioner indeed has a qualifying prior felony conviction that has not been invalidated on grounds of constitutional invalidity, innocence, or legal error. Petitioner admitted his prior conviction at the initial sentencing proceeding. In such circumstances, requiring him to bear the consequences of his prior conduct is not unfair.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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